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October 21, 1996



A. Richard Metzger, Jr.
Deputy Bureau Chief
Common Carrier Bureau
Federal Communications Commission
1919 M. Street, N.W.
Room 500
Washington D.C. 20554

Re: Ex parte contact in CC Docket No. 96-61, Part II

Dear Mr. Metzger:

Large users of telecommunications services have a critical interest in the Commission's adoption of its proposal to require interexchange carriers to withdraw their tariffs for domestic interstate services. We have filed formal Comments and Replies in this proceeding, and the undersigned counsel have met with various members of the Commission staff urging adoption of mandatory de-tariffing in the case of customer-specific service offerings.

We understand that a question has recently arisen as to whether the Commission should, if it decides to mandate the withdrawal of customer-specific tariffs, require the carriers to permit public inspection of the contracts under which they would then provide service to large customers. We believe that such a requirement would undermine a key objective of mandatory de-tariffing, create its own set of serious problems and, most importantly, do little or nothing to advance the public interest.

One of the key benefits of mandatory de-tariffing is that it will limit the ability of competing carriers to share price information with one another. The Commission has repeatedly found -- correctly, in our experience -- that tariffs permit carriers to monitor one another's rates and mimic one another's rate decreases and increases, fostering the widely recognized practice by AT&T's competitors of pricing just below AT&T's published rates. Indeed, the risk of such "collusive pricing" was among the reasons the agency adopted its de-

tariffing policy 17 years ago.[1] The Commission has cited this same concern in adopting rules to minimize the sharing of information by streamlining the tariff process.[2] After a decade's experience with de-tariffing, the Commission reaffirmed that the policy "'eliminates a potential vehicle for collusive conduct and facilitates price discounting' and, therefore, serves the public interest better than streamlined regulation."[3] Even more recently, the Commission again observed that "traditional tariff regulation of nondominant carriers . . . is actually counterproductive since it can inhibit price competition . . . ."[4]

Any requirement that contracts be made public would re-establish, with official government blessing, a regime that facilitates the sharing of price information and allows carriers to signal changes in prices and terms to each other.[5] This behavior is highly anti-competitive, and should not be fostered by regulatory requirements concerning disclosure of tariffs, contracts or otherwise.

Public disclosure of contract terms would have an additional detrimental effect. Carrier contracts with large customers often address matters that are not disclosed in the tariffs filed by the carriers -- staffing requirements, customized billing requirements, network management functionality, customer security requirements, etc. A contract disclosure obligation would, therefore, sweep more broadly than Section 203 of the Act and would be needlessly invasive of the proprietary interests of the parties to those contracts -- customers as well as carriers. The Commission decided not to enact such a requirement

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1 *Policy and Rules Concerning Rates for Competitive Common Carrier Services,* Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308, 358 (1979).

2 *Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd 5880, 5902 (1991) (shortening the advance notice period and reducing the required documentation for tariff filings by the dominant interexchange carrier).

3 *Tariff Filing Requirements for Interstate Common Carriers,* Report and Order, 7 FCC Rcd 8072, 8080 n.118 (1992).

4 *Tariff Filing Requirements for Nondominant Carriers*, Memorandum Opinion and Order, 8 FCC Rcd 6752 (1993) (footnotes omitted).

5 As an example of the latter, see the "monitoring conditions" that AT&T began to insert into Contract Tariffs a couple of years ago. Monitoring conditions are essentially restrictions on traffic mix -- they require that a certain percentage of a customer's traffic be interstate, or outside of daytime hours, or that the customer have no more than X locations with switched access. Shortly after AT&T introduced the practice, it was copied by MCI and then Sprint.

several years ago for these very reasons, and should reaffirm that conclusion today.[6]

We understand that a concern has been raised about the Commission's ability to enforce the Act's prohibition on unreasonable discrimination if carriers withdraw their tariffs. Although Section 202(a) is unquestionably a core requirement of the Act, market forces can be relied on to guarantee compliance. Indeed, the Commission long-ago concluded that a robust competitive market, backed up by the Commission's complaint process, can ensure compliance with the Act's core provisions.[7] The interexchange market is far more competitive today than it was over a decade ago, and the conclusions reached then are surely more -- not less -- persuasive now.

Finally, we understand that an issue has also been raised concerning whether public disclosure of carrier/customer contracts is necessary to enable the Commission to enforce the geographic rate averaging requirements of Section 254(g) of the Act. To the extent that these requirements pertain to negotiated service arrangements,[8] and to the extent that the Commission is concerned that market forces and the complaint process may not offer adequate protection, the Commission may need to gather information about these transactions. It should do so, however, in ways that are least damaging to the important public interest in deterring parallel pricing on the part of the interexchange carriers. Carrier reports filed either under seal with the agency or publicly released in aggregate form should meet the Commission's needs in this area without providing a mechanism for the sharing of price information among competitors.

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6 *See Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd at 5901-02.

7 *See Policy and Rules Concerning Rates for Competitive Common Carrier Services,* First Report and Order, 85 FCC 2d 1, 31 (1980); Second Report and Order, 91 FCC 2d 59, 69 (1982); Fourth Report and Order, 95 FCC 2d 554, 580 (1983); Sixth Report and Order, 99 FCC 2d 1020, 1029-30 (1985), *vacated sub nom. MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985). *See also Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1478 (1994).

8 *See Policy and Rules Concerning the Interstate Interexchange Marketplace*, Report and Order, ¶ 27 (August 7, 1996) ("[W]e forbear from applying Section 254(g), consistent with the intent of Congress, to the extent necessary to permit carriers to depart from geographic rate averaging to offer contract tariffs, Tariff 12 offerings, optional calling plans, temporary promotions, and private line services in accordance with our policy as previously applied to AT&T.").

In sum, the concerns that might underlie a contract disclosure requirement are not probative in the current market environment and, in any event, do not warrant the risks that such a requirement would pose to competitive interests.

Sincerely,

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